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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY PEREZ, Defendant and Appellant.	E068741 (Super.Ct.No. FWV1500812) OPINION

APPEAL from the Superior Court of San Bernardino County. Shahla S. Sabet, Judge. Affirmed.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette Cavalier and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Anthony Joshua Perez, a high school English teacher, was charged and convicted of three counts of having sexual intercourse with a minor (Pen. Code,[1] § 261.5, subd. (c), counts 1-3), one count of oral copulation on a minor (§ 288a, subd. (b)(1), count 4), and one count of resisting arrest (§ 148, subd. (a)(1), count 5), arising from an intimate relationship with one of his students. He was sentenced to an aggregate term of five years in state prison and appealed.

On appeal, defendant argues that (1) his conviction for resisting arrest (count 5) should be reversed because it occurred in Riverside County, rather than San Bernardino County, where the matter was prosecuted, (2) his federal due process rights were violated because the information alleged under penalty of perjury that the resisting arrest charge occurred in San Bernardino County, and (3) his rights to due process and equal protection were violated by the order requiring him to register as a sex offender. We affirm.

BACKGROUND

Defendant, in his late 20s, was an English teacher at Fontana High School in 2014. Jane Doe was a senior, enrolled in his sixth period class that year. Occasionally Doe stayed after class to talk with defendant; sometimes a friend stayed after class with her, but mostly Doe stayed late. She also had her lunch in defendant's class, although there were other students present during lunch hour. Doe had told defendant she was writing a book and defendant offered to help, so the two started spending time together after school and on weekends.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

The relationship between Doe and defendant changed over time, from giving her rides home, to kissing her, and to taking her to hotels where they spent the night on three or four occasions. When Doe spent the night with defendant, she told her mother she was spending the night with a friend. In all, Doe had sexual intercourse with defendant three or four times, and he orally copulated her once.

On the fourth occasion on which Doe spent the night in a hotel with defendant, her mother became concerned when she could not contact her daughter. Doe finally sent her mother a text message at 2:30 a.m. saying she fell asleep at her friend's house and would stay there. But Doe's mother did not hear from Doe the next day, so Doe's brother contacted Doe's friend through Facebook, only to learn that Doe hadn't stayed there. The friend, who was concerned about Doe's relationship with her English teacher, gave Doe's mother a phone number, which the mother called, leaving a message on what turned out to be defendant's phone that if she did not hear from Doe, she would call the police. Doe called her mother right back.

Doe's mother also went through Doe's room and found a journal along with a transcript of text messages between Doe and defendant. She also found four hotel room keys in a drawer. Doe's mother, an educator herself, informed the principal of the high school. Eventually the police got involved with the investigation in December 2014.

Officer Goltara, of the Fontana Police Department, was assigned to investigate the sexual assault case. In December 2014, Officer Goltara participated in the execution of a search warrant of defendant's residence in Corona, at which time police collected

computers and other electronic devices. Later, he and other officers participated in the execution of an arrest warrant at defendant's residence, in the same location. When officers knocked, defendant stated he would not come out, and that they needed a warrant. The officer responded that they had a warrant, at which point defendant was heard to go to the rear of the house. The officers forced entry.

Once inside, the officers heard defendant towards the rear of the residence, so they proceeded in that direction. In the kitchen there was a door leading to the garage. When the officers looked through the door into the garage, they observed defendant near the open door to his vehicle. Officers directed defendant to raise his hands, but instead of raising both hands, he would raise one, then put it down and raise the other. Because defendant would not comply with the officer's commands, Officer Goltara opened the automatic garage door, where another detective was positioned just outside. Defendant struggled with officers, flailing around and kicking his legs. He was eventually handcuffed and taken into custody.

On April 18, 2016, an information was filed alleging three counts of violating section 261.5, subdivision (c) (unlawful sexual intercourse with a minor more than three years younger than the perpetrator, counts 1-3), one count of violating section 288a, subdivision (b)(1) (oral copulation with a person under 18, count 4), and one count of violating section 148, subdivision (a)(1) (resisting arrest, a misdemeanor, count 4).

Defendant was tried by a jury. As part of their case-in-chief, the People introduced evidence that in 2010, defendant had sexual intercourse with, and orally

copulated another 17-year-old high school student, pursuant to Evidence Code section 1108. This witness contacted police after reading an article in the newspaper about defendant's current charges. Defendant was convicted of all charges. The court sentenced defendant to the upper term of three years on count 4, which was designated the principle term, followed by separate consecutive terms of eight months each (one-third the midterm) for counts 1 through 3, for a total aggregate term of 5 years in prison. Defendant was sentenced to 133 days for the misdemeanor, count 5, which was deemed served in full. Defendant timely appealed.

DISCUSSION

1. *Trial of the Misdemeanor in San Bernardino Superior Court Does Not Require Reversal.*

Defendant argues that because the resisting arrest charge occurred at his residence in Corona, a city within the County of Riverside, proper venue for that count is in Riverside County, and that reversal was required because it was prosecuted in San Bernardino County. The People argue that the claim has been forfeited by defendant's failure to object. We find no error, and if there were error, defendant forfeited the claim.

Penal Code section 1462.2 governs venue for trial of misdemeanor cases, providing that except as provided in the Vehicle Code, the proper court for the trial of misdemeanors is the superior court of the county within which the offense charged was committed. The code section goes on to state, "If an action or proceeding is commenced in a court other than the court herein designated as the proper court for the trial, the action

may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time of pleading, requests an order transferring the action or proceeding to the proper court." (Pen. Code, § 1462.2.) The code further provides that the judge shall, at the time of arraignment, inform the defendant of the right to be tried in the county where the offense was committed.

Venue, pursuant to section 777, simply denotes the place or places appropriate for a defendant's trial in California criminal actions and does not implicate the trial court's fundamental jurisdiction. (*People v. Posey* (2004) 32 Cal.4th 193, 207, 208.) Venue is ordinarily a question of law for the trial court to determine prior to trial. (*Id*. at p. 210.) "Unlike subject matter jurisdiction, territorial jurisdiction is a nonfundamental aspect of jurisdiction which may be waived either by defendant's consent or by failure to object." (*People v. Gbadebo-Soda* (1995) 38 Cal.App.4th 160, 170.) By failing to specifically raise a claim of improper venue prior to the commencement of trial, a party forfeits the claim. (*People v. Posey, supra*, at p. 200; *People v. Betts* (2005) 34 Cal.4th 1039, 1056.)

The same rule applies for venue respecting misdemeanors: "Under section 1462.2, a defendant in a misdemeanor proceeding forfeits the right to object to venue unless he or she raises the objection at the time a plea to the charge is entered." (*People v. Simon* (2001) 25 Cal.4th 1082, 1102.) The second paragraph of section 1462.2 refers to a municipal court "having jurisdiction of the subject matter [of an action or proceeding]" even though the court is not located in the county where the offense is

committed. (*People v. Jackson* (1983) 150 Cal.App.3d Supp.1, 12, overruled on a different point in *People v. Posey*, *supra*, 32 Cal.4th at p. 205, fn.5.)

The Legislature therefore provided for "dual jurisdiction," with the only limitation being that the trial court have proper subject matter jurisdiction. (*Jackson*, *supra*, 150 Cal.App.3d. Supp. 1 at pp. 12-13.) Thus, crimes that are committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory. (*Posey*, *supra,* 32 Cal.4th at p. 199.)

Despite the fact the offense described in count 5 occurred in Riverside County, the San Bernardino County Superior Court had proper subject matter jurisdiction, in the absence of a timely objection or motion for change of venue. Defendant's act of resisting arrest for the substantive crimes committed in San Bernardino was an act or effect related to the charges that gave rise to dual jurisdiction. The failure to object before trial has commenced forfeited any claim of error.

Defendant argues that the prosecution misled him by pleading in the information that the offense occurred "in the above named judicial district." However, while that information is incorrect, defendant was hardly misled: First, defendant, of all people, knew he lived in Corona, within Riverside County. Second, at the preliminary hearing, the officer testified that defendant was arrested pursuant to an arrest warrant executed at his residence in Corona. Defendant was well-apprised of the venue issue long before trial

and failed to object prior to the commencement of trial. The prosecution may have erred in asserting the offense in count 5 was committed in the same judicial district, but it cannot be said to have misled the defendant.

Nor was trial counsel ineffective for failing to raise the question of venue in the trial court. To establish ineffective assistance of counsel, appellant must show that appellant's representation fell below an objective standard of reasonable representation which prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The decision not to raise vicinage or venue falls within the attorney's authority to control the tactical direction of a proceeding. "[I]t is well established that the power to control judicial proceedings is vested exclusively in counsel." (*Townsend v. Superior Court* (1975) 15 Cal. 3d 774, 781; *People v. Gbadebo-Soda, supra,* 38 Cal.App.4th at pp. 171-172 [attorney's failure to object to venue or vicinage was not ineffective assistance of counsel].)

Of course, counsel's control is not unlimited, and "there are certain fundamental protections guaranteed an accused which counsel may not waive without his client's concurrence," such as the right to a jury trial, the right not to incriminate oneself, and the general right to present a defense. (*Townsend, supra,* 15 Cal.3d at p. 781.) However, venue and vicinage are not such fundamental rights. (*People v. Gbadebo-Soda, supra,* 38 Cal.App.4th at p. 172.) Thus, defendant's counsel's representation did not fall below an objectively reasonable standard.

No error was preserved for review.

2. *There Was No Due Process Violation or Prosecutorial Misconduct Because Defendant Was Not Mislead About Where the Crime was Committed.*

Defendant argues that the prosecutor's allegation in the information that count 5 was committed "in the same judicial district" as the felonies was misconduct, resulting in an unfair trial because the jury heard "the damning evidence of Appellant's alleged conduct respecting the police officers." At the outset, defendant acknowledges the lack of objection to the misconduct, but argues his counsel's failure to object was prejudicial. We disagree.

First, defendant has not established how the allegation that the crime was committed in the wrong judicial district constitutes misconduct, warranting objection by defense counsel and reversal for a violation of due process. "Conduct by a prosecutor that does not violate a court ruling is misconduct only if it amounts to 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' [citations] or 'is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 373; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.)

The error alleged here, in wrongly stating under penalty of perjury that the resisting arrest count was committed in San Bernardino County, cannot be described as egregious, or even a deceptive method, where the prosecutor personally examined the witnesses at the preliminary hearing, eliciting the Riverside County location of defendant's address. Defendant was represented by counsel at that hearing, so defendant

had ample opportunity to make a motion or objection to venue prior to commencement of trial. And, we assume defendant knew his county of residence and was not misled into believing he resided in San Bernardino County by the allegation of the information.

Second, to preserve a claim of prosecutorial misconduct for appeal, a defendant must have timely objected and requested the trial court to admonish the jury. (*People v. Silva, supra,* 25 Cal.4th at p. 373; see also, *People v. Lopez* (2008) 42 Cal.4th 960, 966.) Otherwise, a claim of prosecutorial misconduct is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*People v. Silva, supra,* at p. 373, citing *People v. Price* (1991) 1 Cal.4th 324,447.)

Third, a defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel, but such claims are more appropriately raised on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored. (*People v. Lopez, supra,* 42 Cal.4th at p. 966, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) Tactical reasons for challenged decisions do not usually appear on the record, so a claim of ineffective assistance of counsel will not be successful unless there could be no conceivable reason for counsel's acts or omissions. (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

In any event, defendant has failed to show prejudice, which obviates the need for us to determine whether counsel's representation was deficient. (*People v. Carrasco*

(2014) 59 Cal.4th 924, 982; see also, *People v. Mendoza* (2000) 24 Cal.4th 130, 164.) Merely asserting, without factual or legal analysis, or authority, that the inclusion of the evidence of defendant's act of resisting arrest was "damning," is insufficient. To the contrary, given the "damning" evidence of the felony counts of having sexual intercourse with a minor, it cannot be said the defendant's misdemeanor resisting arrest conduct tipped the scales in the minds of the jurors. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071.) Absent a showing that the inclusion of count 5, a misdemeanor, was so egregious that it infected the trial with unfairness, defendant has not met his burden.

3. *Requiring Defendant to Register as a Sex Offender Is not a Violation of his Rights to Due Process or Equal Protection Under the Laws.*

Defendant argues that imposing sex offender registration on defendant for his conviction on count 4, oral copulation on a minor, in violation of section 288a, subdivision (b)(1), violated his right to equal protection under the laws. His argument appears to challenge the registration requirement for voluntary acts of oral copulation involving older adolescents, relying on *People v. Hofsheier* (2006) 37 Cal.4th 1185.

In *Hofsheier,* the California Supreme Court found that there was no rational basis for distinguishing between oral copulation with a minor and unlawful sexual intercourse, as it related to mandatory sex offender registration. (*Hofsheier, supra,* 37 Cal.4th at pp. 1206-1207.) However, in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871 (*Johnson*), at pages 883 and 888, the Supreme Court reconsidered the issue and overruled *Hofsheier.* The court explained that there was a rational basis for requiring registration

for nonforcible oral copulation on a minor given the actual and plausible legislative concerns and goals of deterrence, preventing recidivism, and protecting the public. (*Johnson, supra,* 60 Cal.4th at p. 884.)

The court noted that sexual predators are more successful in manipulating minors to engage in oral sex, as opposed to sexual intercourse, because pubescent minors may be more receptive to an act that does not risk pregnancy and which many minors believe has a reduced risk of sexually transmitted diseases. (*Johnson, supra,* 60 Cal.4th at p. 883.)

Additionally, pedophiles, who, by definition, target prepubescent minors, have been shown to engage in fondling and genital manipulation more than intercourse. (*Johnson*, *supra*, 60 Cal.4th at pp. 883-884.) Thus, "the Legislature could plausibly assume that predators and pedophiles engaging in oral copulation have more opportunities to reoffend than those engaging in sexual intercourse, and . . . are especially prone to recidivism." (*Id.,* at p. 884.)

Defendant has a history of engaging in sexual relationships with underaged girls: Doe, Lauren (the Evid. Code, § 1108 witness), and two other girls about whom Lauren testified in her testimony.[2] He "friended" students on his Facebook page. As a teacher of

[2] Police officers who seized defendant's cell phone and computer found videos of underage girls, including one that appeared to have been made inside a classroom at Corona High School, so the Corona Police Department assisted in identifying and interviewing them. Forensic evaluation of the photographic and video evidence led to the discovery of other victims. Eventually, charges were filed in Riverside County Superior Court, number RIF1600109. Defendant pled guilty in that case and appealed in case number E070162. We take judicial notice of our file pursuant to Evidence Code sections 452 and 459.

teenaged students, who engaged in sexual relationships with at least two of them in violation of his position of trust as their teacher, he has the attributes of a predator. The Legislature has made registration as a sex offender mandatory for defendant's conviction (§ 290, subd. (b)), and the California Supreme Court has concluded there is a rational basis for the legislation. (*Johnson, supra,* 60 Cal.4th at pp. 883-884.) We are bound by this authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

There was no constitutional violation.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.